JAR:bm

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TAMMY Z. JEANPIERRE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 02-4138-JAR**
	)	
FOOT LOCKER, INC.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT

This matter is before the Court on Defendant Foot Locker, Inc.'s Motion for Summary Judgment (Doc. 23). Tammy Z. Jeanpierre ("Plaintiff") claims that she was wrongfully terminated because of her disability, in violation of the Americans With Disabilities Act ("ADA"). Because Plaintiff fails to establish a prima facie case, the Court grants Defendant's motion.

UNCONTROVERTED FACTS

The following relevant facts are uncontroverted. Plaintiff did not file an opposing brief setting forth a concise statement of material facts as to which she contends a genuine issue exists, but these facts are well supported by the record and are construed in the light most favorable to the nonmovant Plaintiff. Immaterial facts and factual averments not properly supported by the record are omitted. Defendant hired Plaintiff on February 26, 2000, as a Material Handler in the

Inventory Control ("IC") department at Defendant's distribution facility in Junction City, Kansas. Plaintiff's job required "heavy lifting and moving of 55 pounds on a regular basis, as well as standing, stooping and bending for most of the day." Plaintiff was informed of these job requirements before she accepted employment by Defendant. Plaintiff was transferred from the Material Handler position to an Equipment Operator position on May 9, 2000.

As an Equipment Operator, Plaintiff was "responsible for the safe operation of all power equipment to accurately move, stack and load product throughout" Defendant's distribution center, which included safely operating the "swing reach truck, reach truck, order picker and any other machine needed to complete the job." Plaintiff's only concern while employed by Defendant was that she should have been rotated to a different machine instead of continuing on the same machine for three consecutive months. However, despite this concern, Plaintiff continued to work as an Equipment Operator; and she does not claim that the failure to rotate was an adverse employment act. Plaintiff agrees that she was treated fairly at all times by her supervisor and other employees, and does not claim that she was discriminated against in any way other than termination of her job.

Plaintiff claims that she is disabled from an on the job injury that occurred on September 13, 2001. Plaintiff began experiencing pain in her right shoulder while sweeping the warehouse floor. On September 14, 2001, Plaintiff was examined by Brian Calkins, a certified physician's assistant, who directed Plaintiff to not use her right arm or hand until she could meet with Dr. Jimmy W. Jenkins, M.D. Plaintiff met with Dr. Jenkins on September 18, 2001, but no longer complained of pain in her right shoulder; instead, Plaintiff complained of pain in her left arm and hand. Between the examinations by Calkins and Dr. Jenkins, Plaintiff missed several

physical therapy appointments. Dr. Jenkins diagnosed Plaintiff with left forearm tendinitis and released her to work, with instructions not to use her left arm and to wear a splint on her left wrist when working.

On September 18, 2001, in an unrelated matter, Plaintiff requested and was approved for Family and Medical Leave, related to her being treated for a kidney infection. This leave began on September 17, 2001 and ended on October 1, 2001. Plaintiff returned to work briefly on October 2, 2001, but was excused due to a lack of available work. From October 3, 2001 through October 16, 2001, Plaintiff was absent, and did not contact Defendant to explain the reason for her absence.

Plaintiff was examined by Calkins again on October 16, 2001. He noted that she had persistent pain in her left elbow and right shoulder. Calkins released her to work with restrictions including "no pushing or pulling over 5 pounds, reaching above shoulder level" and limited use of her arm. On October 17, 2001, Calkins completed a "Return to Work Program, Light Duty Tasks" form indicating that Plaintiff was able to perform the following tasks: identifying merchandise, occasional lifting up to 10 pounds, cleaning/dusting, emptying trash, data entry, filing and storing files, separating tickets, sorting labels, papers, etc. and photocopying.

Plaintiff returned to work on October 17, 2001, but was again truant from work between October 18, 2001 and October 24, 2001. Defendant extended Plaintiff's prior Family and Medical Leave during this time. On October 25 and 26, 2001, Plaintiff was absent from work without an excuse. A letter sent to Plaintiff on October 26, 2001, from Defendant's Director of Human Resources explained that Defendant had work available for Plaintiff within her work

restrictions and that the absences beginning on October 25, 2001, were unexcused and subject to Defendant's Absenteeism Policy. This policy provides that three consecutive unexcused absences will result in job termination. Plaintiff did not respond to this letter and continued to miss work. Another letter was sent to Plaintiff on November 1, 2001, again reminding Plaintiff of her obligation to call in if she was going to miss work and notifying Plaintiff that she would be terminated if she did not contact Defendant by November 5, 2001. A third and final letter was sent to Plaintiff on November 5, 2001, after she failed to respond to the previous notices from Defendant. The letter contained a copy of Plaintiff's work restrictions and informed Plaintiff that Defendant had work available that was within her work restrictions; the letter also notified Plaintiff that "[f]ailure to report to work on Wednesday, November 7, 2001, will be deemed job abandonment" and that she would be terminated immediately. After failing to respond or return to work, Plaintiff's employment with Defendant was terminated on November 7, 2001, for job abandonment.

Plaintiff filed this lawsuit on September 6, 2002, after meeting with a representative of the Equal Employment Opportunity Commission. Plaintiff brought this action because she believes she was wrongfully terminated based upon her disability, and claims that due to the pain in her left forearm and wrist and right shoulder "a major part of [her] life has been affected, as far as what jobs [she] is able to do."

CONCLUSIONS OF LAW

Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] In applying this standard, the Court must "view the factual record and draw all reasonable inferences therefrom most favorably to the nonmovant."[2] An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way."[3] A factual dispute is "material" only if "under the substantive law it is essential to the proper disposition of the claim."[4] If the party bearing the burden of persuasion at trial fails to come forward with sufficient evidence on an essential element of its prima facie case, all issues concerning all other elements of the claim and any defenses become immaterial.[5]

The moving party "bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law."[6] A movant that does not bear the burden of persuasion at trial need not negate the nonmovant's claim, and may make its prima facie demonstration by simply pointing out the lack of evidence for the nonmovant on an essential element of the nonmovant's claim."[7]

If the movant meets this initial burden, "the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings; the burden shifts to the nonmovant to

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[1] Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir. 1993).

[2] *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citations omitted).

[3] *Id.* (citation omitted).

[4] *Id.* (citation omitted).

[5] *Id.* (citation omitted).

[6] *Id.* at 670-71 (citation omitted).

[7] *Id.* at 671 (citation omitted).

go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant."[8] In order to do this, "the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein."[9]

Defendant has stated the facts of this case in accordance with D. Kan. Rule 56.1. Plaintiff, however, has failed to submit a response. Thus, Defendant's proffered material facts are deemed uncontroverted. Plaintiff's claim could be considered abandoned because she failed to respond to Defendant's motion for summary judgment.[10] But, the Court will not automatically grant Defendant's motion for summary judgment because of Plaintiff's failure to respond to Defendant's motion. Rather, the Court will base its determination on Defendant's statement of uncontroverted facts, considering whether Defendant, as the movant, met its initial summary judgment burden.

ADA

The Americans with Disabilities Act ("ADA") prohibits discrimination against a qualified person because of that person's disability, in regard to job application procedures, hiring, advancement, or discharge, compensation, job training, and other terms, conditions, and privileges of employment.[11] When considering a claim brought under the ADA, the Court is

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[8] *Id.* (citations omitted); *see also* Fed. R. Civ. P. 56(e).

[9] *Id.*(citation omitted).

[10] *See Eckholt v. American Business Information, Inc.*, 873 F. Supp. 526, 534 (D. Kan. 1994) (holding that where parties did not respond to an issue in a summary judgment motion, parties relinquished any claim on the issue and conceded that summary judgment should be entered against them).

[11] 42 U.S.C. § 12112(a).

guided by the *McDonnell Douglas* analytical framework.[12] The first step requires a plaintiff to establish a prima facie case by proving that: (1) he or she is a disabled person within the meaning of the ADA; (2) he or she is a "qualified individual," that is, he or she is able to perform the essential functions of the job, with or without accommodation; and (3) he or she suffered adverse employment action because of the disability.[13]

Plaintiff's claim fails, even if not abandoned, because Plaintiff is not "disabled" within the meaning of the ADA. A person is considered to have a disability protected by the ADA if he or she (a) has a physical or mental impairment that substantially limits one or more of his or her major life activities; (b) has a record of such an impairment; or (c) is regarded by the employer as having such an impairment.[14] Plaintiff's claim is based on only the first definition of disability, a physical impairment that limits a major life activity. A three-step process is used to determine whether an individual is disabled under this first definition.[15] First, the court must determine if the plaintiff suffers from a physical or mental impairment.[16] If so, the court next identifies the life activities affected by the impairment and determines whether they are major life activities under the ADA.[17] Finally, the court determines whether the impairment "substantially limits" the

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[12] *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Williams v. Widnall,* 79 F.3d 1003, 1005 & n. 3 (10th Cir. 1996) (explaining application of the analysis in cases under the ADA).

[13] *Morgan v. Hilti, Inc.,* 108 F.3d 1319, 1323 (10th Cir. 1997).

[14] 42 U.S.C. § 12102(2).

[15] *See Poindexter v. Atchison, Topeka and Santa Fe Railway Co.,* 168 F.3d 1228, 1230 (10th Cir. 1999) (citing *Bragdon v. Abbott,* 524 U.S. 624, 631 (1998)).

[16] *Id.*

[17] *Id.*

major life activities identified in the previous step.[18]

Plaintiff asserts that she suffers from arm and shoulder injuries. It is well established that "[m]erely having an impairment does not make one disabled for purposes of the ADA."[19] Plaintiff must show that she is substantially limited in a major life activity.[20] The ADA demands that the court examine exactly how a plaintiff's major life activities are limited by the impairment.[21]

The court must identify those life activities affected by the impairment and determine whether they are major life activities under the ADA.[22] Although the ADA does not define the term "major life activities," regulations promulgated by the Equal Employment Opportunity Commission provide some guidance. These regulations adopt the definition of "major life activities" found in the Rehabilitation Act regulations. Major life activities "means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[23] Subsequent interpretation has expanded "major life activities" to include "sitting, standing, lifting, and reaching."[24] In determining whether a particular activity constitutes a "major life activity," the court must ask "whether that activity *is*

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[18] *Id.*

[19] *Toyota Motor Mfg., Kentucky, Inc., v. Williams*, 534 U.S. 184, 193 (2002).

[20] *Id.*

[21] *See Steele v. Thiokol Corp.,* 241 F.3d 1248, 1253 (10th Cir. 2001) (citation omitted).

[22] *Poindexter,* 168 F.3d at 1230.

[23] 29 C.F.R. § 1630.2(i).

[24] 29 C.F.R. Pt. 1630, Appendix to Part 1630-Interpretive Guidance to Title I of the ADA, § 1630.2(i); *See also, Lowe v. Angelo's Italian Foods, Inc.,* 87 F.3d 1170 (10th Cir. 1996) (lifting is a major life activity.)

significant within the meaning of the ADA, rather than whether that activity is important to that particular individual."[25]

To state a claim under the ADA, "a plaintiff must articulate with precision the impairment alleged and the major life activity affected by that impairment."[26] The court "is to analyze only the major life activity asserted by the plaintiff."[27]

Although Plaintiff does not specifically identify the major life activity she claims has been limited by her impairment, based on Plaintiff's statements and testimony that her injuries affect what jobs she is able to perform, the Court will presume that her affected major life activity is working. The Tenth Circuit has held that working is a major life activity,[28] but the Supreme Court has suggested that work may not be a major life activity under the ADA.[29]

Once Plaintiff identifies her major life activity, she must show that her impairment "substantially limits" this activity.[30] An impairment is substantially limiting if Plaintiff is "(i) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major

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[25] *Pack v. Kmart Corp.,* 166 F.3d 1300, 1305 (10th Cir. 1999), *cert. denied* 528 U.S. 811 (1999) (emphasis added).

[26] *Poindexter,* 168 F.3d at 1232.

[27] *Doyal v. Oklahoma Heart, Inc.,* 213 F.3d 492, 496 (10th Cir. 2000) (quoting *Poindexter,* 168 F.3d at 1231).

[28] *Id.* at 213 F.3d at 495-96.

[29] *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 492 (1999).

[30] *Poindexter,* 168 F.3d at 1230.

life activity."[31] The Supreme Court has defined "substantially limits" as "considerably" or "to a large degree."[32] In making the determination, the following factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and 3) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.[33]

Determining whether an impairment substantially limits a major life activity must also include consideration of the effects of any corrective measures.[34] "[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures–both positive and negative–must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."[35]

Plaintiff does not show that her impairment affects, much less "substantially limits" her ability to work. "To demonstrate that an impairment 'substantially limits' the major life activity of working, an individual must show 'significant[] restrict[ion] in the ability to perform either a *class of jobs* or a *broad range of jobs in various classes* as compared to the average person having comparable training, skills and abilities.'"[36] "[T]he inability to perform a single, particular

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[31] 29 C.F.R. § 1630.2(j)(1).

[32] *Toyota,* 534 U.S. at 196.

[33] *Lusk v. Ryder Integrated Logistics,* 238 F.3d 1237, 1240 (10th Cir. 2001) (citing 29 C.F.R. § 1630.2(j)(2)).

[34] *Sutton*, 527 U.S. at 482.

[35] *See id*.

[36] *Bolton v. Scrivner, Inc.,* 36 F.3d 939, 942 (10th Cir. 1994), *cert. denied* 513 U.S. 1152 (1995) (quoting 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added)).

job does not constitute a substantial limitation in the major life activity of working."[37] Plaintiff did not present any evidence that she was limited in her ability to perform either a class of jobs or a broad range of jobs in various classes. To the contrary, Plaintiff's physician gave her a full return to work. In doing so, he noted that she was able to perform many employment duties, all of which Defendant continually made available to Plaintiff. Therefore, Plaintiff's impairment does not constitute a disability under the ADA.

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that she has failed to establish a genuine issue of material fact as to whether she was "disabled" within the meaning of the ADA. Summary judgment is granted with respect to Plaintiff's ADA claim of wrongful termination.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (Doc. 23) is GRANTED.

IT IS SO ORDERED.

Dated this 2nd day of October, 2003.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

[37] *Sutton v. United Air Lines, Inc.,* 130 F.3d 893, 904 (10th Cir. 1997), *aff'd* 527 U.S. 471 (1999) (quoting 29 C.F.R. § 1630.2(j)(3)(i)).